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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THEODORE MARCZAK,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES and
LATOYA WILEY,

Defendants and Respondents.

B279571

Los Angeles County
Super. Ct. No. BC619851

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Law Office of Pamela R. Tripp, Pamela Rae Tripp and Ernesto Paz Rey for Plaintiff and Appellant.

Law Offices of David J. Weiss, David J. Weiss and Jaime E. Verducci for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Theodore Marczak appeals from a judgment in favor of defendants and respondents Los Angeles County (County) and Latoya Wiley entered after the trial court sustained their demurrers without leave to amend.

The present case arises out of a prior juvenile dependency proceeding in which Marczak attempted to gain custody of his granddaughter (the minor) after she was removed from her mother's custody. In that proceeding, the court denied Marczak's petition under Welfare and Institutions Code section 388,¹ finding Marczak was not eligible for placement. Marczak appealed the decision and a different panel of this division affirmed the dependency court's decision.

While the appeal was pending, Marczak filed the present civil suit against the County and Wiley (collectively respondents), one of the social workers from the Department of Children and Family Services (Department) who worked on the dependency case. Marczak generally alleged that Wiley intentionally sabotaged his request for custody through, among other things, delay and falsification of evidence. The original complaint states claims for violation of federal civil rights (42 U.S.C. § 1983), violation of state civil rights (Civ. Code, §§ 43, 49, 51.7, 52, 52.1), negligent training and supervision, intentional infliction of emotional distress, and negligent infliction of emotional distress. The court ultimately sustained respondents' demurrers without leave to amend on the grounds of lack of standing, collateral

¹ All undesignated statutory references are to the Welfare and Institutions Code.

estoppel, and governmental immunity. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

1. The Underlying Juvenile Dependency Proceeding²

1.1. General Background

The Department removed the minor from her mother in November 2012 when she was 15 days old, and placed her with foster parents. Throughout the dependency, the minor's mother was difficult to locate and had almost no contact with the Department. Eventually, the court terminated her parental rights under section 366.26.

When the minor was detained, mother named maternal cousin, Marlys M., as a possible relative placement for the baby. Mother did not mention her own father, Marczak.

At some point, the Department learned of Marczak's existence. On February 20, 2013, Marczak informed the dependency investigator that he would like the minor to be released to his care so she could live with him and his adult daughter, Winter M., in Holyoke, Minnesota. In June 2013, at the disposition hearing in the minor's dependency, the juvenile court ordered the Department to initiate an Interstate Compact for the Placement of Children (ICPC) and a home study to determine whether to place the minor with Marczak. In addition, after finding that mother's whereabouts were unknown, the juvenile court denied her reunification services (§ 361.5, subd. (b)(1)) and set the selection and implementation hearing. (§ 366.26.)

² The facts in this section are taken from our unpublished decision in *In re D.M.* (June 21, 2016, B266501) [nonpub. opn.].

The Carlton County Minnesota Health and Human Services Office (the Minnesota Agency) approved Marczak's ICPC in February 2014, 15 months after the minor was removed from mother's custody. Meanwhile, Marczak had maintained monthly contact with the Department about the status of the ICPC and the child. He continued to want the minor placed with him. Marczak indicated that Winter, who has a criminal history, did not reside in his home.

The Department recommended to the juvenile court in its status review report that the minor not be released to Marczak. It had received several information forms and telephone calls from the family of the maternal grandmother expressing "concern at the prospect of placing the child in the care of [Marczak]." Maternal aunt Jodie S., maternal aunt Dena M., and maternal second cousin Marllys M. described how Marczak physically, emotionally, and sexually abused his wife, the now-deceased maternal grandmother, and girls in his care. These relatives reported that Marczak had physically abused mother when she was 15 years old causing her to be removed from his custody. Jodie S., who lived with Marczak from the age of seven, related that Winter and her boyfriend, who lived with Marczak, abused drugs and had extensive criminal histories. Jodie S. also reported that Marczak has a history of alcohol use, was convicted of driving under the influence, and that many family members were made to watch Marczak physically abuse the maternal grandmother. Jodie S. was "astonished that the [S]tate of Minnesota would issue a foster care license to [Marczak]." The Department recommended against moving the minor to Minnesota. In addition, the foster family social worker opined that a move would be detrimental for the child, who was thriving

in the care of her foster parents, with whom she had lived for 16 months.

1.2. Marczak's Request for Custody

At the minor's July 30, 2014 selection and implementation hearing, the Department informed the juvenile court and parties that Marczak planned to file a modification petition under section 388. The Department maintained its view that Marczak was not a suitable caregiver for the minor. The child's attorney agreed that placement of the child with Marczak was not safe and wanted to proceed with adoption by the foster parents. The court continued the section 366.26 hearing.

Marczak eventually filed a section 388 petition seeking custody of the minor in Minnesota, to be supervised by the Minnesota Agency. As a change of circumstance, Marczak stated that he had completed the required procedures to be licensed as a foster parent by the State of Minnesota. In reply, the Department reiterated its concerns about placing the child with Marczak and restated its approval of the care that the foster parents were providing the child. The court ordered a hearing on the petition.

In its interim review report filed immediately prior to the hearing on Marczak's section 388 petition, the Department related that when mother was 16 years old, Marczak hit her with his fist on the right side of her head near the temple. The maternal grandmother called child protective services and mother was removed from their care for about a year while Marczak completed court-ordered services. Mother's Minnesota dependency file was destroyed. Mother stated, on the eve of the minor's section 366.26 hearing, that she wanted the minor released to Marczak and announced her plan to return to Minnesota. The Department also attached to its report the ICPC

documents from Carlton County, Minnesota. There, in response to the question, “Have any of your own children been in foster care ...” Marczak had written: “[mother] as a teenager. Took off w/ her mother. Due to delinquent behavior.”

The Department noted Marczak’s failure to mention that he struck mother in the head. Additionally, Marczak responded “no” to the question, “Has any individual living in your household ... been involved in an incident of assault, child battering, child abuse, child molesting, or child neglect?” Also attached to the Department’s interim review report were police reports indicating approximately 14 incidents between 2006 and 2013 in which Winter and her boyfriend, who lived in Marczak’s house, stole guns, propane tanks, and a gas can from homes in the area, were arrested for disorderly conduct and possession of stolen property, and engaged in discord with neighbors.

At the hearing on Marczak’s petition for modification, the Department’s social worker testified that mother never contacted her or provided her with any information about her family or otherwise until just before the hearing. The first time the social worker heard about the existence of a grandfather was when Marczak contacted her in 2013. She told him about the ICPC process. The two spoke approximately once a month after the ICPC was initiated. The social worker did not know how many messages he left her. Although the ICPC was approved, the Department did not place the minor with Marczak because, as it reported to the juvenile court at the time, the maternal relatives’ oral and written statements raised concerns. The social worker did not investigate the accusations. The reasons for the Department’s recommendation against placing the minor with Marczak were: the maternal relatives’ statements; the minor’s

growth with the foster parents who were the only caretakers the child had ever known; and mother had never contacted the social worker about placing the child with Marczak.

Brenda Carlson at the Minnesota Agency testified that, in connection with the ICPC process, she discovered Marczak's conviction for driving under the influence. Asked who else lived in his home to run a criminal background check, Marczak named Winter but omitted to mention Winter's boyfriend. Winter's criminal background check revealed a criminal history disqualifying her from living with the minor or providing the minor with care. Marczak promised that Winter would move out. Marczak told Carlson about his involvement with the Carlton County Children and Family Services who had "assist[ed] him with parenting information and therapy for his children," but because mother's case was more than 10 years old, the files had been expunged and so she was unable to investigate. Carlson was unaware that relatives accused Marczak of sexual molestation when she approved his foster care license. Carlson testified that she received the ICPC request in September 2013 and completed her portion of it in January 2014. She first learned about the accusations made by the maternal relatives when she called the Department in April 2014 about the status of the ICPC.

In his testimony, Marczak described how he came to hit mother when she was a teenager. With respect to the relatives' statements, he claimed he had not spoken to those family members for over a decade.

1.3. The Court's Denial of the Custody Request

The juvenile court denied Marczak's modification petition. The court found that Marczak failed to demonstrate changed circumstances and found that the minor's best interest would not

be served by removing her from the foster parents. The court found that Marczak had not been “completely forthright about the information he provided during the [ICPC] approval process” and that his disclosure about mother’s foster care history was “inaccurate.”

The court declined to make a finding about whether the family members’ allegations of sexual abuse were true because much of it had not been verified. But, it could not ignore the concerns raised in the maternal relatives’ reports. Certain of the relatives’ allegations seemed more consistent with the evidence than did Marczak’s testimony. The allegation that people with criminal histories would have access to the minor was borne out by Carlson’s testimony about Winter’s disqualifying criminal background. The court rejected Marczak’s suggestion that the relatives had ulterior motives in making the allegations to the Department, noting that the relatives had no personal stake in the outcome of the section 388 petition as they were not competing to have the minor be placed or visit with them. Meanwhile, the court found that the minor was in a safe and loving home, where she had been for most of her life and was fully integrated within the family with whom she had strong emotional ties.

1.4. Marczak’s Appeal

Marczak appealed the court’s order denying his section 388 petition, arguing that the Department failed to give him preferential placement as required under section 361.3. A different panel of this division affirmed the court’s decision. Specifically, we observed the following facts supported the court’s

finding that Marczak did not meet the requirements of section 361.3, subdivision (a)³:

- Winter and her boyfriend had criminal records;
- Mother had been removed from Marczak's custody when she was a teenager due to his physical abuse of her;
- Marczak's relatives provided statements accusing Marczak of physically, emotionally and sexually abusing his wife and girls in his care;
- Marczak had a history of alcohol abuse and was convicted of driving under the influence;
- Marczak was not fully forthcoming and provided inaccurate information during the ICPC process; and
- Mother did not identify Marczak as a possible placement option.

2. The Civil Action Against the County and Social Worker Wiley

2.1. The Original Complaint and Demurrer

In May 2016, while the appeal in the dependency proceeding was pending, Marczak filed the present civil suit against the County and social worker Wiley. Marczak asserted claims for violation of federal civil rights (42 U.S.C. § 1983), violation of state civil rights (Civ. Code, § 43), negligent training

³ That subdivision sets forth various facts that the county social worker and court must consider when a relative of the child requests placement of the child.

and supervision, intentional infliction of emotional distress, and negligent infliction of emotional distress. The original complaint purports to summarize the testimony presented during the hearing on the section 388 petition, focusing mainly on Wiley's testimony in which she discussed the investigation she conducted and the reports she submitted to the court. In general terms, the complaint alleges Wiley committed a variety of acts designed to thwart Marczak's attempt to gain custody of the minor and which resulted in the denial of his section 388 petition. Specifically, the complaint alleges Wiley engaged in a conspiracy to maintain the minor's placement with the foster parents by "selective reporting, undue emphasis, sensationalism, half-truths, false statements, innuendo, repetition, misleading language, mis-characterization [*sic*], 'guilt by association,' omission in reporting details of Minnesota's investigation, and knowing failure to investigate" the statements provided by the maternal relatives.

The first cause of action under 42 U.S.C. § 1983 asserted that Wiley's actions violated his civil rights including his due process rights under the Fourteenth Amendment to the United States Constitution "by use of false and fabricated evidence, by failing to provide timely notice to Plaintiff, by failing to give Plaintiff a timely opportunity to be heard, by suppressing exculpatory evidence, and by failure to carry out duties imposed by statute." Those actions, the complaint alleges, resulted in a "critical delay" in the dependency proceedings that furthered bonding between the minor and the foster parents.

The second cause of action, for negligence, alleges the Department followed policies including "trickery, fabrications, false reports, and/or misleading evidence through the artifice of half-truths, the policy of suppressing and/or failing to disclose

exculpatory evidence in preparing and presenting reports and documents to the juvenile court, causing interference with and suppression of Plaintiff's rights, including rights concerning familial relations," and failed to adequately train and supervise its employees.

The third cause of action for intentional infliction of emotional distress alleges Wiley knew or should have known that "false and misleading reports would, as they ultimately did, deprive Plaintiff of his constitutional right to the placement and ultimate adoption of his granddaughter." Marczak did not oppose the demurrer to the fourth cause of action, for negligent infliction of emotional distress.

As to these first four causes of action, the court sustained the County's and Wiley's demurrer without leave to amend. They argued all the claims were barred by the doctrine of collateral estoppel, Marczak lacked standing to bring the claims based on the violation of federal and state civil rights, both the County and Wiley were entitled to governmental immunities, and Marczak did not plead sufficient facts to overcome the governmental immunity defense. The court's written order does not disclose the basis for the ruling.

2.2. The Amended Complaint and Demurrer

The court granted leave to amend the fifth cause of action for violation of state civil rights. The amended complaint cites Civil Code sections 43, 49, 51.7, 52, and 52.1 and, like the original complaint, seeks monetary damages. The allegations in the amended complaint focus on the same actions by Wiley but characterized them in stronger terms than the original complaint, e.g., Wiley "maliciously and intentionally failed to explain Marczak's rights and options to Marczak, failed to inform

and/or contact the child's maternal relatives, failed to investigate, and otherwise failed to fulfill the various obligations imposed by the Welfare and Institutions Code, including those guaranteed by sections 309, subdivision (e)(1)[,] section 319, subdivision (f)(2), section 361.3[,], and other relevant sections." Most of the alleged misconduct by Wiley falls into three general categories: conspiring with the foster parents to discourage Marczak's efforts to obtain custody of the minor, presenting false evidence that reflected negatively on Marczak to the court in an effort to influence the court's decision, and delaying presentation of evidence to the court that reflected positively on Marczak.

In their demurrer to the first amended complaint, the County and Wiley asserted the same arguments contained in the demurrer to the original complaint. The court sustained the demurrer without leave to amend on three alternative grounds: (1) the County and its employees are entitled to immunity under a number of sections of the Government Code including section 822.2 [providing immunity for misrepresentations]; (2) the complaint failed to allege conduct falling under Government Code section 820.21 which section provides an exception to governmental immunities; and (3) the remaining cause of action was barred by the doctrine of collateral estoppel.

The court entered judgment in favor of the County and Wiley and this timely appeal followed.

DISCUSSION

1. Standard of Review

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied

factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Courts must also consider judicially noticed matters. (*Ibid.*) In addition, we give the complaint a reasonable interpretation and read it in context. (*Ibid.*) If the trial court has sustained the demurer [*sic*], we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid.*) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81, disapproved on another point by *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939–941.)

2. As a noncustodial grandparent, Marczak lacks standing to bring a federal civil rights claim premised on the right to custody of the minor.

“42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. To prove a case under section 1983, the plaintiff must demonstrate that (1) the action occurred ‘under color of state law’ and (2) the action resulted in the deprivation of a constitutional right or federal statutory right. [Citation.]” (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)

The right at issue here is Marczak's asserted right to adopt his granddaughter. But federal law does not recognize such a right, at least as to noncustodial grandparents such as Marczak. In *Miller v. Cal. Dep't of Soc. Servs.* (9th Cir. 2004) 355 F.3d 1172, the court explained: "While there is no question that *parents* have a constitutionally protected liberty interest in making decisions about the care, custody, and control of their children, *see, e.g., Troxel v. Granville*, 530 U.S. 57, 65, (2000) (plurality opinion); *Lee v. City of Los Angeles*, 250 F.3d 668, 685 (9th Cir.2001) (citing *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir.1985)), we have never held that any such right extends to *grandparents*." (*Miller*, p. 1175.) The court also expressly rejected the notion that grandparents might have some fundamental right based purely on the blood relationship: "[T]here is no authority for 'the proposition that a grandparent, by virtue of genetic link alone, enjoys a fundamental liberty interest in the adoption of her grandchildren.' [Citation.]" (*Id.* at p. 1176.) For this reason, respondents argue, Marczak lacks standing to bring a claim for violation of civil rights under federal law.

Marczak responds that "[i]n the context of juvenile dependency cases, standing has been conferred on foster parents, blood relatives, grandparents, and even persons who have no 'officially recognized legal status, such as persons who have cared for the child on a less than full time basis.'" He is correct that in *dependency proceedings*, grandparents may have standing to participate, just as he did in the underlying dependency proceeding by filing a petition under section 388 and participating in the hearing on the petition. (See, e.g., *In re B.G.* (1974) 11 Cal.3d 679, 692 [foster parents, or "de facto" parents

permitted to appear as parties in juvenile dependency proceedings]; *Charles S. v. Superior Court* (1985) 168 Cal.App.3d 151, 156–157 [grandparent who visited minor on a weekly basis was entitled to participate in permanency planning hearing].) But Marczak’s point is irrelevant to the question of standing in the present *civil* action against Wiley and the County, i.e., whether Marczak has a cognizable right or interest sufficient to support a federal civil rights claim. As noted above, he does not.

3. Marczak’s state civil rights claims fail as a matter of law.

Marczak’s amended complaint asserts respondents violated his state civil rights under Civil Code sections 43, 49, 51.7, 52 and 52.1. We address each section in turn.

Civil Code section 43 provides: “Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.” The first amended complaint alleges respondents violated Marczak’s “personal and civil rights” through the use of fraud, fabricated evidence, delay, failure to disclose exculpatory evidence, and by obtaining evidence through duress, fraud, and undue influence. The complaint also cites to *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820—a case that does not address Civil Code section 43.

On appeal, Marczak asserts he has “asserted his rights under Civil Code section 43 against interference with personal relations and his statutory rights under section 309, 319 and 361.3.” Marczak cites no authority, and we have found none, suggesting that Civil Code section 43 vests a grandparent with a

right of custody of a grandchild. And none of the statutes cited create such a right.

Section 319 sets forth the criteria the Department must use to secure a temporary placement (not more than 15 days) for a minor detained after a court's initial hearing on a dependency petition. Although the statute provides a variety of options for the Department's consideration, it states that "[r]elatives shall be given preferential consideration for placement of the child. As used in this section, 'relative' means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons, even if the marriage was terminated by death or dissolution." (§ 319, subd. (h)(2).) Section 309 provides similar guidance regarding temporary placement following a detention hearing and also directs the Department to place a minor with parents, guardians, or relatives whenever possible. (§ 309, subd. (a).) Section 361.3 also establishes a preference for relative placement (upon a relative's request) following a minor's removal from parental custody. (§ 361.3.) But as to each of these provisions, the Department is directed to consider relative placement in a broader context focused on the safety and best interests of the child at issue. (§§ 309, subd. (a)(1)–(6), 319, subd. (h)(3), 361.3, subd. (a)(1)–(8).) These provisions cannot reasonably be construed as vesting a right to custody in a minor's grandparents and Marczak has provided no authority for that proposition.

Civil Code section 49 provides: "The rights of personal relations forbid: [¶] (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody; [¶]

(b) The seduction of a person under the age of legal consent; [¶]
(c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation.” None of the complaint’s allegations fall within the scope of this statute.

Civil Code section 51.7 provides, in pertinent part, “All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.” The first amended complaint alleges respondents violated this section by “conspiring to deny Marczak’s rights to due process of law by force and under color of law,” and by “using false, misrepresented and fabricated evidence to deny Marczak the exercise of Marczak’s rights secured by the State of California” This claim fails as a matter of law because Marczak has not pleaded that he is a member of any class of persons protected by the statute, nor has he alleged that Wiley was motivated by some animus relevant to his status as a person in any protected category.

Civil Code section 52 does not create any substantive rights; it simply authorizes a civil action by any person denied a right under other related sections of the Civil Code. Accordingly, this section cannot serve an independent basis for any cause of action.

Civil Code section 52.1 authorizes civil suit by public prosecutors or victims of injustice to obtain injunctive or other equitable relief and/or civil penalties of \$25,000, “[i]f a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state” (Civ. Code, § 52.1, subds. (b), (c).) Again, this claim fails as a matter of law because even if Marczak could ultimately prove that he has a federal or state constitutional right or a right under state law, he has not pleaded that Wiley acted through threats, intimidation or coercion. To the contrary, the allegations of the first amended complaint relate to Wiley purportedly avoiding telephone calls, delaying the processing of paperwork, delaying the presentation of information to the trial court, and the like—actions which would plainly not constitute a threat, intimidation, or coercion.

4. Marczak’s tort claims fail as a matter of law.

With respect to Marczak’s two tort claims—intentional infliction of emotional distress and negligence—we conclude the claims are largely barred by governmental immunities. And to the extent the conduct complained of potentially falls outside the scope of those immunities, Marczak’s claims are barred by the doctrine of collateral estoppel.

As a general matter, government employees such as Wiley are often immune from liability for actions taken within the scope of their employment. As pertinent here, Government Code section 820.2 provides that “[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act

or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.” (Gov. Code, § 820.2.) Similarly, Government Code section 821.6 provides that “[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.” (Gov. Code, § 821.6.)

Numerous courts have held these two statutory provisions provide broad protection for social workers: “Those courts have held that a social worker’s decisions relating to ... the investigation of child abuse, removal of a minor, and instigation of dependency proceedings, are discretionary decisions subject to immunity under section 820.2, and/or prosecutorial or quasi-prosecutorial decisions subject to immunity under section 821.6. (E.g., *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 882–883 (*Alicia T.*) [county and its social workers held immune from liability under ‘either or both of [sections 820.2 and 821.6]’ for alleged negligence in investigating report of child molestation]; *Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278, 282–283 (*Jenkins*) [county and its social workers held immune from liability under § 821.6 for ‘fail[ing] to use due care by not thoroughly investigating the child abuse report and fail[ing] to weigh and present all the evidence’]; *Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1559–1561 (*Newton*) [citing § 820.2 in holding county immune from liability for actions ‘necessary to make a meaningful investigation’ of child abuse]; *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 633, 644–645 (*Terrell R.*) [county held immune from liability under § 820.2 for alleged negligent placement and supervision of

child in foster home where child was sexually molested].” (*Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 466 (*Jacqueline T.*)). And, as pertinent here, immunity also extends to adoption planning activities and decision-making. (See *Ronald S. v. County of San Diego* (1993) 16 Cal.App.4th 887, 899 (*Ronald S.*) [“county held immune from liability under § 821.6 for negligent selection of an adoptive home for a dependent child”].)

“The immunity provided by these statutes is broad, and includes immunity for social workers’ removal and placement decisions. [Citations.] Immunity ‘applies even to “lousy” decisions in which the worker abuses his or her discretion, including decisions based on “woefully inadequate information.” [Citation.]’ [Citation.]” (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1285.) Our “courts have reasoned that ‘[c]ivil liability for a mistaken decision would place the courts in the “unseemly position” of making the county accountable in damages for a “decision-making process” delegated to it by statute.’” (*Newton, supra*, 217 Cal.App.3d at p. 1560; see also *Ronald S., supra*, 16 Cal.App.4th at p. 897 [“[t]he nature of the investigation to be conducted and the ultimate determination of suitability of adoptive parents [by social workers] bear the hallmarks of uniquely discretionary activity”].)” (*Jacqueline T., supra*, 155 Cal.App.4th at p. 466.) Although sections 821.6 and 820.2 expressly immunize only governmental employees, if an employee is immune, so is the County. (Gov. Code, § 815.2, subd. (b)⁴; *Jacqueline T.*, pp. 468–469.)

⁴ Government Code section 815.2 states: “(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or

Marczak contends, however, that Wiley's conduct is not immunized because it falls within the scope of Government Code section 820.21, which provides:

"(a) Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code shall not extend to any of the following, if committed with malice:

"(1) Perjury.

"(2) Fabrication of evidence.

"(3) Failure to disclose known exculpatory evidence.

"(4) Obtaining testimony by duress, as defined in Section 1569 of the Civil Code, fraud, as defined in either Section 1572 or Section 1573 of the Civil Code, or undue influence, as defined in Section 1575 of the Civil Code.

"(b) As used in this section, 'malice' means conduct that is intended by the person described in subdivision (a) to cause injury to the plaintiff or despicable conduct that is carried on by the person described in subdivision (a) with a willful and conscious disregard of the rights or safety of others."

omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Arguably, some of the conduct pled in the amended complaint⁵ could conceivably fall within the scope of Government Code section 820.21. Marczak claims, for example, that Wiley committed perjury or fabricated evidence—conduct plainly exempted from immunity. But the actual allegations of the complaint, if proven, would not constitute either perjury or fabrication of evidence. The specific actions identified in the amended complaint are that Wiley “obtained statements by maternal relatives which contained hearsay statements and lies,” Wiley admitted under oath she had no idea if the statements were true, and Wiley “intentionally asked the court to issue an order that the child not be placed with Marczak based on these false statements.” It is plain that the “false statements” identified by Marczak are the statements by *maternal relatives* suggesting he had previously abused his wife and girls under his care. The complaint does not allege that *Wiley* lied about or manufactured that evidence.

Marczak also claims that Wiley intentionally delayed consideration of his request for custody by, for example, not timely processing the ICPC, providing the completed ICPC report to the court, or providing the court with information favorable to Marczak—all in an effort to preserve the minor’s placement with the foster parents. Again, this conduct, if proven, might fall within the immunity exception in Government Code section

⁵ Although the first amended complaint addressed only the cause of action for violation of state civil rights, we consider the allegations stated therein in relation to Marczak’s tort claims because the allegations could be added to an amended complaint on remand, if the claims do not fail as a matter of law.

820.21. But on this point, Marczak’s claim is barred by the doctrine of collateral estoppel.

Collateral estoppel precludes a party from litigating in a second action against the same party or its privity an issue that was actually litigated in a former proceeding. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 809.) All the elements of collateral estoppel are satisfied here. Marczak was a party in the juvenile proceeding because he brought a section 388 petition. And he presented testimony to the court relating to his request for custody of the minor and therefore actually litigated the issue of whether he qualified for placement of the minor.

In the present action, and with respect to all his causes of action, Marczak claims Wiley’s alleged misconduct caused the denial of his request for placement and adoption of the minor. But in the underlying proceeding, the court considered whether Wiley’s tactics impacted its assessment and concluded they did not, as we explained in our opinion affirming the court’s decision:

“[Marczak]’s appellate brief goes to great lengths to blame the result here on the Department’s failure to evaluate him sooner. He argues that the Department then failed to notify him of his rights and the steps to take under the ICPC procedure, and then stymied the process by avoiding his telephone calls, failing to notify him of hearings and to set up visitation, and even delaying in notifying the juvenile court of his existence, which delays only allowed [the minor] more time to bond with the [foster parents]. (*In re R.T.* (2015) 232 Cal.App.4th 1284.) The contention is misplaced. As is clear from the record, mother—who was impossible to locate and who rarely communicated with the Department—*did not name [Marczak] until just before the hearing on this section 388 petition.* At the time the child was

removed, mother named Marlys M. as a potential relative caretaker. Although the Department should have commenced the process sooner and acted more quickly upon learning of [Marczak]’s wish to take custody of [the minor], and although by the time the court made its ruling [the minor] had bonded with the [foster parents], *on this record, [Marczak] would not have qualified under section 361.3 for placement, regardless of how early in this dependency the Department made its assessment of him.*” (*In re D.M., supra*, B266501, first italics in original, second italics added.) As applied here, then, the doctrine of collateral estoppel bars Marczak from claiming that Wiley’s alleged misconduct caused the denial of his section 388 petition—an element essential to all causes of action asserted in this case.

Marczak contends the doctrine of collateral estoppel does not apply because he brought a “completely different claim—seeking monetary damages as opposed to physical custody” of the minor. We presume Marczak is attempting to avoid the primary right theory.

“California’s res judicata doctrine is based upon the primary right theory. As we explained in *Crowley v. Kattelman* (1994) 8 Cal.4th 666, 681–682:

‘The primary right theory is a theory of code pleading that has long been followed in California. It provides that a “cause of action” is comprised of a “primary right” of the plaintiff, a corresponding “primary duty” of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] ...

‘As far as its content is concerned, the primary right is simply the plaintiff’s right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: “Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.” [Citation.] The primary right must also be distinguished from the *remedy* sought: “The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.” [Citation.]

‘The primary right theory ... is invoked ... when a plaintiff attempts to divide a primary right and enforce it in two suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [citations]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of *res judicata*.’” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.)

Here, Marczak asserts that he brought a “completely different claim” in his civil suit because he is seeking damages rather than custody. We reject this contention because, as just stated, the right at issue in the present case—Marczak’s asserted right to custody of his granddaughter—is the same primary right asserted in his petition under section 388. As just stated, the fact that Marczak is requesting a different remedy in the present case is not dispositive.

In sum, it has already been determined that Wiley's alleged actions and inactions did not influence the court's decision to deny Marczak's request for custody of the minor. Accordingly, to the extent Marczak's claims in the present action are based on the contention that Wiley's actions caused the court to deny his request for custody, they are barred.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.